BOARD OF APPEALS CASE NO. 080	*	BEFORE THE
APPLICANT: CLARK FARM LLC	*	ZONING HEARING EXAMINER
REQUEST: Rezone 161.48 acres from Agricultural to Rural Residential; 1701 Grafton Shope Road, Forest Hill	*	OF HARFORD COUNTY
	*	Hearing Advertised
	*	Aegis: 4/1/98 & 4/8/98
HEARING DATE: June 4, 1998		Record: 4/3/98 & 4/10/98
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ZONING HEARING EXAMINER'S DECISION

The Applicant, Clark Farm LLC, is seeking a piecemeal rezoning of 161.48 acres from AG to RR.

The subject property is located at 1701 Grafton Shop Road, Forest Hill, Maryland 21050 and is more particularly identified on Tax Map 40, Grid 4D, Parcel 55. The parcel is zoned AG and is located within the Third Election District.

First to testify was Mr. Stoney Fraley,called by the Protestants. Mr. Fraley is Chief of Current Planning with the Department of Planning and Zoning. Mr. Fraley was in charge of the 1989 Comprehensive Rezoning process. During the 1989 Comprehensive Rezoning process, the subject property was an issue before the Council. The owner, Mrs. Jane Clark, had requested her property be rezoned R1 or R2. Both of these classifications at that time would have required water and sewer service. At the time of the 1989 request, a report regarding septic limitations was prepared by Frederick Ward & Associates which indicated that the cost of providing water and sewer to the property would be quite high. Additionally, in 1989, a map of septic limitations indicated that 99 of the Applicant's acres had severe septic limitations, 29 acres had moderate limitations and 47 acres had slight septic limitations. Mr. Fraley stated that in 1989 the Department believed this property was required, because of the septic limitations, to have public water and sewer available. Since there was public water and sewer available, although costly, the Department recommended R1 and/or R2 zoning for the parcel and never considered RR. The Council declined to zone the property R1 or R2 in 1989.

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Mr. Howard Klein appeared as one of the principal owners of Clark Farm, LLC, the Applicant in this case. Mr. Klein described the current farm and said that it is no longer viable as a farming operation. He stated that RR zoning would allow development of 42 lots of 1-2 acres in size. 99-100 acres would remain as forest and open space. He said that the parcel is too small for a viable dairy farm and that liabilities associated with horse riding stables are prohibitive. He also said erosion and odors from manure and fertilizer have resulted in complaints from neighbors. He said that the parcel is currently leased and is farmed but that the rents do not even cover taxes associated with the property.

Mr. Paul Muddiman appeared next and qualified as an expert in site plan design. Mr. Muddiman explained that since 1989 new information has become available regarding the ability of the property to support water and sewer. A recent perc test study, performed by Geo-Technology Associates, indicates that the property will support private septic systems. In 1989, the Council did not consider RR as a viable classification because, as Mr. Fraley pointed out, the information available to the 1989 Council indicate moderate to severe septic problems on all but a few acres of the parcel. Muddiman concluded that the information available to the Council regarding the ability of the parcel to support septic service was incorrect and based on incomplete data.

In 1998, the Harford County Department of Public Works determined for the first time that servicing the property with public water and sewer was no longer practical., feasible or economical (Applicant's Exhibit 10). Muddiman pointed out that this is contrary to what the Council was told in 1989 regarding the availability of public water and sewer service to this parcel. Based on cost projections prepared by MRA, the cost of improvements required to bring public water and sewer service to the parcel is $2,227,334.00 which is not feasible. This cost reflects an $11,000.00 per lot premium if this parcel were to be developed as R1 property.

Mr. Muddiman also discussed transportation changes in the area since 1989. Grafton Shop Road, previously classified by the County as a Rural Minor Arterial has been reclassified as a Rural Major Collector. Osborne Pkwy. Has been extended from Route 24 to Grafton Shop Road and a signal has been installed at the intersection of Route 24 and Osborne Pkwy.

In Muddiman's opinion, these changes demonstrate a capacity to support RR zoning which did not exist in 1989.

Next to testify was Mr. Mickey Cornelius of The Traffic Group who was accepted as an expert traffic consultant. Mr. Cornelius conducted a study of traffic impacts and prepared a report which was submitted as Applicant's Exhibit 19. The witness testified that, assuming RR development as proposed, all major intersections would continue to operate at current acceptable levels of service. The witness concluded that no adverse traffic impacts would result from the rezoning request and subsequent development.

Mr. Roger Mainster appeared as an expert real estate appraiser. Mr. Mainster said that he had conducted a study of values of real property in the subdivisions surrounding the subject parcel in an effort to determine if RR zoning and development would have an adverse impact on those values. Based on his analysis, the development of the property as single family detached homes of the type intended by the Applicant would not adversely impact property values. To the contrary, Mainster believed that this type of development would serve to increase values of surrounding properties.

Mr. Lee Cunningham appeared as an expert in land use and planning issues. Mr. Cunningham testified that the parcel was designated Low Intensity and RR infill during the 1989 Comprehensive Rezoning process. The property is still classified low intensity on the 1996 Plan and is included within the development envelope. Maintaining the zoning of this parcel as AG during the 1989 Comprehensive Rezoning was inconsistent with the 1988 Master Land Use Plan and the policy of the Council at that time.

In the opinion of the witness, a mistake was made by the Council in 1989 for several reasons:

1. The new improvements to Route 24, Osborne Parkway and inclusion of a new signalized intersection, together with the upgrade classification of Grafton Shop Road as a Rural Major Collector demonstrates the ability of the road infrastructure to support RR zoning.

2. During the presentation of the 1996 Master Land Use Plan, it was determined that there is a need in this area for single family detached dwellings which would serve as transition from the development envelope to the rural areas of the county. The 1989 Council could not have known that such a need would be required in 1998.

3. The Council erroneously believed in 1989 that this property would not support private septic service. Coupled with the fact that public water and sewer was available, although costly, only R1 and R2 zoning was considered by the Council and ultimately rejected. Subsequent perc tests have proven the basis for the 1989 Council's position to be incorrect and based on incomplete data.

4. The 1989 Council believed that public water and sewer were available to the property. Only in 1998 did Harford County determine that it was not feasible or economically practical to extend public water and sewer to this property. The 1989 Council relied upon facts in this regard which have proven to be wrong with time.

5. The Council would not have considered RR zoning in 1989 for this parcel because it was within the development envelope and they believed it would be served with water and sewer. Had the Council known in 1989 that public water and sewer would not be available to the property, in the opinion of the witness, RR would have been considered the next logical alternative, however, it was not considered by the Council or the Department of Planning and Zoning.

Mr. Cunningham concluded by stating that RR was the appropriate zoning classification for the property and would have no adverse impact to the surrounding community and would be consistent with the general health and welfare of the community.

Mr. Anthony McClune, Chief of Current Planning for the Department of Planning and Zoning appeared and testified that the Department was of the opinion that the 1989 Council relied on faulty information when it maintained the zoning of AG for this parcel. In the Department's opinion, the erroneous information regarding suitability of private sewer and non-availability of public water and sewer constitute mistakes that allow a rezoning. Further, the Department recommends RR zoning for this parcel and believes it to be an appropriate transition zone between the higher intensity areas to the rural sections of the County.

No Protestants appeared in opposition to the rezoning request.

CONCLUSION:

The Protestant's through the Office of People's Counsel have moved to dismiss the instant case for reasons identical to those raised in other rezoning cases, most notably Case 073 and 074. The Hearing Examiner has previously denied these motions in each and every rezoning case considered by this Hearing Examiner, but for purposes of maintaining the integrity of the record before us, the reasons for those denials is again set forth below.

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The gist of the opponent's argument is twofold. First, the opponents argue that the present Petition is barred by Section 267-13 (E)(1) of the Harford County Code which states:

> *"Notwithstanding any provisions of this Code, during the period of preparation and review of proposed comprehensive revisions or amendments to the Zoning Maps, no applications for zoning reclassification shall be accepted by the county, except as provided in Subsection C of this section, and such a request shall be considered in the preparation or modification of the proposed comprehensive revisions or amendments to the Zoning Maps."*

Secondly, the opponents argue that Section 267-13(E)(3) of the Code, prohibits the acceptance of applications for a period of one year after the adoption of the comprehensive rezoning bill, in this case, Bill 97-55, if the basis for the request for rezoning is a "change in the character of the neighborhood". Specifically, section 267-13(E)(3) provides:

> *"No zoning reclassification of property shall, for a period of 1 year after the adoption, by Bill, of the comprehensive zoning maps applicable thereof, be granted by the County Council, sitting as the Board of Appeals, on the ground that the character of the neighborhood has changed."*

In January, 1996, the Harford County Council voted to commence Comprehensive Rezoning Review pursuant to Code Section 267-13 et seq. And Article VII, section 701 of the Harford County Charter. Thereafter, the Department of Planning and Zoning accepted applications for comprehensive rezoning from July, 1996 through October 15, 1996. During November and December, 1996 the Department. As required by Code Section 267-13(B)(1), reviewed each application and solicited comments upon each application from other county departments and planning councils. In February, 1997, the Department of Planning and Zoning prepared its proposed revisions and recommendations to the Council. These recommendations were the subject of public meetings and further review during the Spring of 1997. In May, 1997, the Department submitted its final recommendations to the Planning Advisory Board (PAB). After review by PAB, the County Executive submitted the proposed revisions and amendments to the Zoning Maps to the County Council who then entered into "the period of Council Review" as required by Code Sec. 267-13(D).

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In August, 1997 Council Bill 97-55 was introduced which proposed changes to the County Zoning Maps. On October 1, 1997 the Council passed Bill 97-55 thereby adopting the recommended changes and amendments to the zoning maps.

In November, 1997, 5,400 Harford County citizens took legislative action to Petition Bill 97-55 to referendum, thereby delaying adoption (or defeat) of the Bill and the changes to the zoning maps that it contemplates until November, 1998.

The first question posed is whether the "period of review" contemplated by Section 267-13(E) has ended by Council vote on Bill 97-55 or whether the period of review is extended until the referendum vote takes place in November, 1998. If the period of review is extended, then the moratorium on acceptance of piecemeal rezoning applications would likewise be extended until that vote takes place. The opponents argue that allowing rezoning cases to be heard on a piecemeal basis would defeat the purpose of the referendum and, quoting the opponent's brief, "..If zoning reclassification applications are accepted prior to November 3, the vote on the referendum will effectively be rendered moot and the right of the voters to review by petitioning Bill 97-55 to referendum will be infringed."

The Hearing Examiner disagrees with the position taken by the opponents. The Hearing Examiner is guided by the principals of statutory construction set forth by the Maryland Court of Special Appeals in Harford County, Md. V. McDonough, 74 Md. App. 119, 523 A2d 724 (1988), wherein the Court stated:

> " The cardinal rule of statutory interpretation is to ascertain and give effect to the intention of the legislative body which enacted the statute. The primary source to which we refer to determine legislative intention is the language of the statute itself. As this Court observed in Ford Motor Land Development v. Comptroller, 68 Md. App. 342, 346-47, 511 A.2d 578, cert.denied, 307 Md. 596, 516 A.2d 567 (1986):
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> > "Where the language [of the statute] is clear and free from doubt the Court has no power to evade it by forced and unreasonable construction". Thus, where there is no ambiguity or obscurity in the language of the statute, there is usually no need to look elsewhere to ascertain the intent of the General Assembly. Furthermore, the statute must be construed considering the context in which the words are used and viewing all pertinent parts, provisions and sections so as to assure a construction consistent with the entire statute. And, if there is no clear indication to the contrary, a statute must be read so that no part of it is rendered surplusage, superfluous, meaningless or nugatory. On the other hand, we shun construction of the statute which will lead to absurd consequences, or a proposed statutory interpretation if its consequences are inconsistent with common sense.

> Finally, we may not rewrite the statute by inserting or omitting words therein to make legislation express an intention not evidenced in its original form, or to create an ambiguity in the statute where none exists."

In the context of the comprehensive rezoning process, the "period of review" ended when the Council voted to pass Bill 97-55. No further review is necessary on the part of the Council, the Department of Planning and Zoning, the citizens advisory boards or any other county department that has thoroughly reviewed the various applications and made their recommendations. Whether ultimate adoption of Bill 97-55 is accomplished by referendum vote or whether the Bill is defeated is irrelevant in determining the "period of review" contemplated by the statute. This position is consistent with the moratorium provisions imposed by 267-13 which are designed to alleviate the burdens on the Department of Planning and Zoning and the County Council in reviewing piecemeal rezoning requests during the period of comprehensive review. It is equally clear, however, that there is one process or the other available to County property owners at all times. Either a property is the subject of comprehensive rezoning or is subject to piecemeal rezoning requests and nothing in the Code indicates a legislative intent to deny the right of any property owner to petition his or her property for rezoning for indefinite and undetermined periods of time.

Bill 95-85 was passed by the Council in January, 1996 and provided that , for a period of eighteen months from the date comprehensive rezoning commenced, no applications for rezoning would be accepted. Legislation to revise the Master Land Use Plan was introduced on May 7, 1996 and eighteen months from that date expired in November, 1997. If there were any further doubt as to the intent of the legislative body in this regard, it is laid to rest by examining subsequent acts of the Council directly related to the petition for referendum. On December 16, 1997, Councilwoman Hezelton introduced Bill 97-79 which purported to be an Emergency Act which would extend the moratorium on acceptance of rezoning applications originally instituted for an eighteen month period by Bill 95-85 until after the referendum vote in November. The Bill recites as reasons for its necessity nearly all of the arguments raised by the opponents in this Motion.

Significantly, this Bill was defeated by vote of the County Council which vote clearly expresses a legislative intent not to extend the period in which applications for rezoning will not be accepted.

The Protestants argue further that allowance of piecemeal rezonings during the period of pendency of the referendum vote on Bill 97-55 effectively denies the citizens a voice in the rezoning process. As pointed out in previous cases, there is a substantial difference between comprehensive zoning and piecemeal rezoning. Comprehensive zoning is a legislative process wherein the County Council invokes the many resources of the County, private sector firms and the input of citizens and citizen advisory boards to effectuate a pattern of zoning that encompasses and impacts the entire County. The result is the legislative enactment of a comprehensive county-wide zoning. Piecemeal rezonings, on the other hand, relate to a single parcel and must pass strict legal scrutiny before a rezoning can be accomplished. The ability of the citizens of Harford County to speak to Council Bill 97-55 are in no way infringed by the grant of a single property owner's request for consideration of piecemeal rezoning of his or her property.

The second argument has little merit in this case. First, the prohibition anticipated by section 267-13(E)(3) applies only to requests for rezonings based on "change in the character of the neighborhood". The Applicants in the instant case have based their request for rezoning on a theory of "mistake" and not "change", therefore the statute does not apply.

Based on the above, the Hearing Examiner concludes that the basis relied upon by the Protestants in their Motion to Dismiss is without merit and denies the Motion.

Having determined that the Application is properly before the Examiner, it must now be determined if the Applicant has met its burden of proof such that it is entitled to have the subject property rezoned.

In Maryland, a parcel of land may not be rezoned simply because the property owner wants the property rezoned or even if the zoning authority feels the property should be rezoned Before a property can be rezoned there must be strong evidence of mistake in the zoning classification or a change in the character of the neighborhood since the last comprehensive rezoning. These principles and their corollaries were summarized by the Maryland Court of

Appeals in Boyce v. Sembly, 25 Md. 43, 344 A.2d 137 (1975). The Court set forth the change-mistake rule which may be summarized as follows:

1. The zoning classification assigned to a parcel of land is presumed to be correct.

2. A piecemeal zoning classification of a parcel of land cannot be granted unless and until the presumption of correctness is overcome.

3. The presumption of correctness can only be overcome by strong evidence that there was a mistake in the comprehensive zoning or there has been a change in the character of the neighborhood of the subject property since the last comprehensive zoning which justifies the piecemeal zoning classification.

4. Once a change in the character of the neighborhood or a mistake in the last comprehensive zoning is established, rezoning is permissible but not mandated.

5. However, once an applicant establishes the requisite change in the character of the neighborhood or a mistake in the comprehensive zoning, the denial of the requested reclassification must be sufficiently related to the public health, safety or welfare to be upheld as a valid exercise of the police power. Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972). In the case of a denial where the applicant has met his burden of establishing a change in the character of the neighborhood or a mistake in the comprehensive zoning, the zoning authority must find facts, upon the evidence, which would support a denial. Messenger v. Board of County Commissioners for Prince George's County, 259 Md. 693, 271 A.2d 166 (1970), The factual determination of the zoning authority must be supported by substantial, competent and material evidence contained in the record. Not every potential problem will serve to validate a decision to deny a requested rezoning; the problems must be real and immediate, not future and imaginary. Furnace Branch Land Company v. Board of County Commissioners, 232 Md. 536, 194 A.2d 640 (1963).

As stated by the Maryland Court of Special Appeals, the presumption of the validity of comprehensive rezoning,

> "...is overcome and error or mistake is established when there is probative evidence to show that the assumptions of premises relied upon by the Council at the time of comprehensive rezoning were invalid. Error can be established by showing that at the time of comprehensive rezoning the Council failed to take into account then existing facts or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension. Error or mistake may also be established by showing that events occurring subsequent to rezoning have proven that the Council's initial premises were incorrect...It is necessary not only to show facts that exist at the time of comprehensive rezoning but also which, if any, of those facts were not actually considered by the Council...Thus, unless there is appropriate evidence to show that there were then existing facts which the Council, in

> fact, failed to take into account or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive rezoning is not overcome, and the question of error is not "fairly debatable". Joyce v. Smelly, supra; Rockville v. Stone, 27 Md. 655, 319 A.2d 536 (1974) (emphasis added).

Thus the Maryland Courts have laid out a two-pronged test. First, has a change in the character of the neighborhood or a mistake been established that would permit the rezoning of the property. Second is whether the property should be rezoned.

In the opinion of the Hearing Examiner, the Applicant presented substantial, unrebutted proof that certain facts believed to be true at the time of the 1989 Comprehensive Zoning process and relied upon by the 1989 County Council have proven to be wrong. First, in 1989 the Council was presented certain facts that led to the conclusion that private septic was not practical for this parcel. Perc tests recently conducted have proven that premise false. Secondly, the 1989 Council believed, based on then available facts, that public water and sewer was a practical reality for this property. In 1998, the Harford County Department of Public Works determined that public water and sewer was not practically or economically feasible for this parcel. Lastly, certain changes to the transportation infrastructure have occurred that could not have been known to the 1989 Council and which lend support for the existence of RR zoning in the Grafton Shop corridor.

RR zoning is consistent with the master Land Use Plan and the unrebutted testimony of the Applicant's witnesses is that RR was an appropriate transition classification for this property.

In the opinion of the Hearing Examiner, therefore, the Applicant has met its burden of proof by establishing that a legal mistake was made by the Council during the 1989 Comprehensive Zoning Review and further, that the property is appropriately zoned as RR. The Hearing Examiner recommends that the requested rezoning be approved.

Date August 12, 1998

William F. Casey
Zoning Hearing Examiner